

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

JAKE BALL TRUST, et al.,)	12-cv-5255
)	
Plaintiffs,)	
)	
v.)	
)	
MATTHEW DURST, et al.,)	Philadelphia, PA
)	January 15, 2013
Defendants.)	9:35 a.m.

TRANSCRIPT OF MOTION
BEFORE THE HONORABLE JOEL SCHNEIDER
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiffs:	VINCENT D'ELIA, ESQUIRE TERESA M. LENTINI, ESQUIRE THE D'ELIA LAW FIRM, LLC 13000 Lincoln Drive West Suite 300 Marlton, NJ 08053
---------------------	---

For the Defendants/ Counterclaimant:	JOHN ANTHONY YACOVELLE, ESQUIRE 8438 Mackall Road St. Leonard, MD 20685
---	---

Audio Operator:	SARAH ECKERT
-----------------	--------------

Transcribed by:	DIANA DOMAN TRANSCRIBING P.O. Box 129 Gibbsboro, New Jersey 08026-0129 Office: (856) 435-7172 Fax: (856) 435-7124 E-mail: dianadoman@comcast.net
-----------------	---

Proceedings recorded by electronic sound recording, transcript
produced by transcription service.

I N D E XPAGE

Motion 3

ARGUMENT:

Re: To add the beneficiaries as named plaintiffs

BY: Mr. D'Elia 5

BY: Ms. Lentini 10

BY: Mr. Yacovelle 21

Re: To add the two law firms and Kelly Peck

ARGUMENT:

BY: Mr. D'Elia 23

BY: Mr. Yacovelle

Re: Plaintiff's request to join 25

Mr. Yacovelle as a defendant

ARGUMENT:

BY: Mr. D'Elia 25, 39

BY: Mr. Yacovelle 32, 44

BY: Ms. Lentini 41

THE COURT:

Decision 46

Colloquy

3

1 (The following was heard in open court at 9:35 a.m.)

2 THE COURT: Good morning, counsel.

3 MR. D'ELIA: Good morning, Your Honor.

4 MR. YACOVELLE: Good morning, Your Honor.

5 THE COURT: Please be seated. We're on the record,
6 and this is the matter of Steven and Reuben Durst v. Matthew
7 Durst, docket 12-5255. Can we have the entries of appearance,
8 starting with the plaintiff, please?

9 MR. D'ELIA: Good morning, Your Honor. I am Vincent
10 D'Elia. I represent the plaintiffs. Seated to my right is my
11 associate, Teresa Lentini.

12 MR. YACOVELLE: Good morning, Your Honor. John
13 Yacovelle for the defendant counterclaimants.

14 THE COURT: Thank you, counsel. We're here for oral
15 argument on plaintiff's motion to amend complaint and
16 disqualify Mr. Yacovelle as attorney for Matthew Durst and
17 remove to State Court. If it hasn't already been made clear,
18 counsel, this Court will address all of those issues except for
19 the issue of whether the case should be remanded back to State
20 Court, but depending upon how the Court rules on the various
21 aspects, it may moot out the remand issue.

22 So the Court has read the papers. The Court is
23 familiar with the issues. It's plaintiff's motion. We'll hear
24 from plaintiff first, but I think a good way to proceed is
25 this, counsel. There's different parts to this motion, and I

Colloquy

4

1 broke it down, and I think we ought to deal with the issues
2 separately, and I'll tell you the issues I have, and then you
3 can tell me if I missed anything.

4 One is plaintiffs wants to amend their complaint to
5 add the beneficiaries as plaintiffs; two, plaintiffs want to
6 amend their complaint to assert that Steven Durst is also suing
7 in his capacity as a trustee; three, plaintiffs want to add as
8 defendants on a malpractice claim Halloran & Sage, Robinson &
9 Cole, and Kelly Galica Peck; four, plaintiffs want to add as a
10 defendant Mr. Yacovelle; five, plaintiffs wants to disqualify
11 Mr. Yacovelle. Those are the five issues I have, and then the
12 last issue is the remand issue, and that's left for Judge
13 Simandle.

14 Counsel, did I miss any issues --

15 MR. D'ELIA: No.

16 THE COURT: -- or did I misstate any of the issues?

17 MR. D'ELIA: No and no. You identified the issues,
18 and I do not believe you missed any. That is pretty much what
19 I had.

20 THE COURT: Okay. Thank you, counsel. Let me start
21 with what I think hopefully might be the easiest issue, and
22 that is plaintiff's request to amend the complaint to make it
23 clear that Mr. Steven Durst is pursuing his claim in his
24 capacity as the trustee as well as an individual. Defendant,
25 is there any objection to that amendment?

D'Elia - Argument

5

1 MR. YACOVELLE: No objection to that, Your Honor.

2 THE COURT: Okay. So eventually, the Court will
3 issue an order granting the amendment to naming Steven Durst,
4 the plaintiff, as an individual and in his capacity as the
5 trustee.

6 Okay. Next issue. Plaintiff, you want to add the
7 beneficiaries as named plaintiffs. Let's address that issue,
8 and like I said, we'll address the issues one at a time. We'll
9 hear your argument and we'll hear defendant's argument.

10 MR. D'ELIA: Judge, my argument is very brief. We
11 felt that in the prior State proceeding, there was a lack of
12 regard for the requirements of the trust in prosecuting that
13 case.

14 In our case, we want to make sure that we have done
15 everything according to the book. In that regard, we are
16 simply -- we are adding the -- adding those plaintiffs in an
17 effort to make sure that everyone was on notice. Plaintiffs
18 can choose to opt out. I understand that they will do that.
19 That's their right to do so.

20 THE COURT: Well, opt out, this is not a class
21 action.

22 MR. D'ELIA: No. No. I know. I know it's not, but
23 all as I'm saying is I -- all as I'm doing is making sure
24 everyone is on notice, and I leave it to the discretion of the
25 Court. It's not a --

1 THE COURT: Counsel, you're doing more than putting
2 everybody on notice. You're seeking -- you're representing
3 that you represent these people and you want to join them as
4 named plaintiffs in the lawsuit. That's a lot different than
5 sending them a letter telling them that this lawsuit is filed.
6 That's very, very different.

7 MR. D'ELIA: The two trustee -- the two trustees that
8 are active right now, Judge -- I wanted to make sure they were
9 brought in -- I leave to the Court's sound discretion.

10 THE COURT: Why do you want them in?

11 MR. D'ELIA: For the reason I've said. I really want
12 to make sure they're on notice as to what's going on and make
13 sure they understand that they have -- they have the right to
14 assert a claim here.

15 THE COURT: What -- what should I do about the two
16 beneficiaries who submitted affidavits saying that they don't
17 want to be represented by you and they don't want to be
18 plaintiffs?

19 MR. D'ELIA: We can dismiss them.

20 THE COURT: What about the other seven or eight? How
21 do I know how they feel?

22 MR. D'ELIA: Two of them have let you know how they
23 feel. The others have not made any expression --

24 THE COURT: How do I know they're on notice? Did you
25 send them a copy -- do you -- are you in an attorney/client

D'Elia - Argument

7

1 relationship with these beneficiaries?

2 MR. D'ELIA: I'm in an attorney/client relationship
3 with the two trustees who have been in touch with all the
4 beneficiaries, and I'm delighted to provide whatever
5 certification the Court may want to indicate their positions on
6 this. I'm satisfied from having discussed with the two
7 trustees that the beneficiaries that are the decedents of the
8 grantor are interested in being plaintiffs in the case for
9 sure.

10 THE COURT: Are you -- you're seeking to represent --
11 I don't know how many there are -- seven or eight or nine
12 people.

13 MR. D'ELIA: Yes. There's nine.

14 THE COURT: Are you representing that you have the
15 authority from each of those nine people to represent them in
16 this lawsuit?

17 MR. D'ELIA: I cannot say that I talked to them in
18 that --

19 THE COURT: So then how could you seek to name them
20 as plaintiffs and how can you seek to represent them if you
21 don't have their authority?

22 MR. D'ELIA: Because I represent the trustees, Your
23 Honor.

24 THE COURT: So what?

25 MR. D'ELIA: Well, the trustees have an obligation to

D'Elia - Argument

8

1 the -- to the beneficiaries.

2 THE COURT: You're seeking to represent, for example,
3 the defendant's son, correct?

4 MR. D'ELIA: Correct.

5 THE COURT: And you're seeking to -- you're
6 representing that you're representing the defendant's son who's
7 suing his father, right?

8 MR. D'ELIA: Correct.

9 THE COURT: And that son submitted an affidavit
10 saying you have no authority to act on his behalf?

11 MR. D'ELIA: But he says --

12 THE COURT: So how can I grant this motion?

13 MR. D'ELIA: He -- that's right. The trustees have
14 indicated that they want to bring the suit on behalf of the
15 beneficiaries, and this beneficiary says I want no part of it.
16 He should be -- he should be dismissed.

17 THE COURT: Well, how do I --

18 MR. D'ELIA: How do I protect --

19 THE COURT: How do I know how the seven or eight
20 other people feel?

21 MR. D'ELIA: I'd be glad to provide supplemental
22 certifications for Your Honor, and I apologize for not doing
23 that. Be glad to provide them for you.

24 THE COURT: Why do we need them in the case?

25 MR. D'ELIA: I'm sorry, Your Honor.

D'Elia - Argument

9

1 THE COURT: Why do we need them in the case?

2 MR. D'ELIA: We need -- so their voices can be heard,
3 Judge. I mean, I'm leaving it to your discretion, and I
4 understand --

5 THE COURT: Aren't the --

6 MR. D'ELIA: -- your problem here.

7 THE COURT: Aren't the trustees the real parties in
8 interest?

9 MR. D'ELIA: Yes.

10 THE COURT: So why do we need the beneficiaries in
11 the case?

12 MR. D'ELIA: The beneficiaries tried to have their
13 voices heard in the State Court action, and they were denied.
14 They --

15 THE COURT: The beneficiaries or your clients sought
16 to intervene in the State case?

17 MR. D'ELIA: Clients sought to intervene, and the
18 beneficiaries, although they did not, because we never got that
19 far, because the Judge had mooted -- decision mooted out the
20 issue, but the beneficiaries were going to be joined in that
21 case had the intervenors been allowed to proceed and had the --
22 had the settlement been set aside.

23 THE COURT: Joined as what? Plaintiffs?

24 MR. D'ELIA: They would have been joined as
25 intervenors, as the other intervenors were. Teresa -- maybe

1 Teresa can answer that for you.

2 MS. LENTINI: Your Honor, I just wanted to add for
3 the -- bring it to the Court's attention that there are
4 different denominations of beneficiaries under the trust
5 agreement. The primary beneficiaries, there are eight of them.
6 All eight of them are the children of Steven Durst. Three of
7 those children did come forward in the State litigation at the
8 time that Reuben Durst and Steven Durst were -- had petitioned
9 to intervene to object to the settlement agreement and to be
10 heard. They were not heard. They were not joined. They --
11 you know, there was no consideration by the State Court, but
12 this is not a trust that operates where all the beneficiaries
13 are on an equal level.

14 These are Mr. Steven Durst's nine children who are
15 the primary beneficiaries, and the depletion of the trust --

16 THE COURT: Nine or eight?

17 MS. LENTINI: There's eight. I'm sorry. I gave him
18 another one. The depletion of the trust affects these eight
19 children primarily, because when we go through the trust
20 agreement and get further into this matter, Your Honor will see
21 that there are secondary beneficiaries to it, and part of the
22 claim in this for the malpractice and also for the
23 misappropriation of the funds and breach of fiduciary duty is
24 that distributions were made by the defendant to his children
25 as the beneficiaries in breach of his fiduciary duties and in

1 breach of the terms.

2 So the primary -- the beneficiaries with the most to
3 lose are Steven Durst's children, and he is the one who
4 originally set up this trust, and he's the one who initially
5 funded it. This was all his money.

6 THE COURT: Well, my question to you is in your
7 proposed amendment --

8 MS. LENTINI: Is to add --

9 THE COURT: This --

10 MS. LENTINI: -- add all of them, because --

11 THE COURT: This is -- you're making an entirely new
12 argument that wasn't in the brief. Your motion does not
13 distinguish between primary and secondary beneficiaries,
14 correct?

15 MS. LENTINI: My -- no. You are correct, Your Honor.
16 My --

17 THE COURT: Your motion seeks to join all the
18 beneficiaries.

19 MS. LENTINI: Absolutely, because who am I to decide
20 who doesn't want to be involved in it and who does not? That
21 is their decision.

22 THE COURT: Yes, but how could you -- how could you
23 seek to represent them without authority to act on their
24 behalf?

25 MS. LENTINI: Because the trust -- the trust gives us

1 the right to act on their behalf.

2 THE COURT: Why do they --

3 MS. LENTINI: We have a --

4 THE COURT: Why do they need to --

5 MS. LENTINI: We have a fiduciary right to -- I mean
6 the fiduciary obligation to represent them and protect them,
7 and if it comes down to, you know, Mr. Durst's nine children,
8 the primary beneficiaries with the greatest losses all want to
9 remain as participants in this, then they came remain as
10 participants. We have no objection if someone does not wish to
11 participate.

12 THE COURT: But aren't the beneficiaries' interests
13 being protected by the trustees? That's their job.

14 MS. LENTINI: They may feel that it's not being --
15 they're not being represented, because there's a dispute
16 between the trustees. They may not agree with either trustee.
17 They may want their own counsel, and we don't want to get --
18 turn around in six months from now or a year from now and have
19 one of them come back and say both of you are wrong and we're
20 going to come after both of you or we're going to come after
21 you or come after your trustees.

22 All -- it's -- all we want to do is give them the
23 opportunity to be represented. If they choose not to be part
24 of this or they choose to say, you know, we want to be
25 represented by Mr. D'Elia or want to be represented -- you

1 know, our interests are with Mr. Yacovelle, then that's fine.

2 THE COURT: But aren't you doing it backwards?

3 Shouldn't you get that authority before you seek to name them
4 as plaintiffs in the case? Here, what you're doing is you're
5 seeking to name them in a case, and then if they come to you
6 and say I don't want you to represent me, well, okay, we'll
7 take you off the caption. Shouldn't you do it the other way
8 around?

9 MS. LENTINI: We can do it that way, Your Honor.
10 That's a legitimate point, and it accomplishes the same manner.
11 I can do it that way and then resubmit for the ones, if any --
12 you know, any of the ones who wish to be specifically named and
13 represented or if any of them wish to have their own counsel
14 enter appearance.

15 THE COURT: Do you believe that the beneficiaries are
16 real parties in interest?

17 MS. LENTINI: Yes.

18 THE COURT: Are they necessary parties?

19 MS. LENTINI: I believe that -- I believe that they
20 are, and the only -- the reason that I believe that they are is
21 because this is not a dispute between the trust and the Goodman
22 (phonetic) entities, like it was in the State litigation. This
23 is a dispute between the trustees that directly affects them,
24 and whether or not they're being properly represented or
25 whether or not their direct interests are being heard by the

Lentini - Argument

14

1 Court in a manner in which they want to present it or what
2 issues they feel is important, then yes.

3 I can't determine what part would be the most
4 important to them. I mean, we are going forward to try and
5 represent the trust in the best fashion in accordance with the
6 trust agreement, but we also have issues of malpractice. We
7 also have issues with Ms. Peck and the Holloran and the other
8 law firm that drafted the trust agreements.

9 So we are going to be coming before this Court asking
10 for interpretation of a trust agreement, interpretation of two
11 amendments which follow it, and all of that is going to affect
12 them. It's not just about Matthew Durst or Mr. Yacovelle.
13 This is about the original trust and the two subsequent
14 amendments, and all of it's going to come into issue.

15 So if they want to be present and they want their own
16 attorney or they -- they have a right to be a party and stand
17 up and stay we disagree with that interpretation or we disagree
18 with how that was drafted or no, this -- because all of that is
19 going to be before this Court. This is not just one minor
20 issue of --

21 THE COURT: Suppose a beneficiary doesn't agree with
22 the position taken by one of the plaintiff trustees. Then
23 what?

24 MS. LENTINI: Then they're going to have to get their
25 own counsel, and we'll have to address that before the Court,

1 and there would be a recommendation.

2 THE COURT: If I permit the joinder --

3 MS. LENTINI: Uh-huh.

4 THE COURT: -- of these beneficiaries, does this
5 Court still have jurisdiction over the case?

6 MS. LENTINI: It would depend -- it would -- on the
7 face of it, no, but since we've already been notified that two
8 of the beneficiaries do not wish to be -- secondary
9 beneficiaries do not wish to be joined, I believe that the
10 Court would still have jurisdiction. So we would not name them
11 as plaintiffs.

12 THE COURT: Do you believe -- let's assume that the
13 beneficiaries or at least some of them are joined.

14 MS. LENTINI: Uh-huh.

15 THE COURT: When the Court looks at whether it has
16 diversity jurisdiction over this case, do you believe the Court
17 should look to the citizenship of the beneficiaries in addition
18 to the citizenship of the trustees?

19 MS. LENTINI: Yes.

20 THE COURT: And what authority do you have for that?

21 MS. LENTINI: (No audible response).

22 THE COURT: Can I respectfully suggest, counsel --

23 MS. LENTINI: Yes, Your Honor.

24 THE COURT: -- that you take a look at the Supreme
25 Court's decision in Navarro?

Lentini - Argument

16

1 MS. LENTINI: Navarro, Your Honor?

2 THE COURT: Navarro.

3 MS. LENTINI: Navarro.

4 THE COURT: N-A-V-A-R-R-O.

5 MS. LENTINI: Uh-huh.

6 THE COURT: 446 U.S. 458 (1980).

7 MS. LENTINI: I will look at that, Your Honor, but --

8 THE COURT: And you may want to --

9 MS. LENTINI: The issue --

10 THE COURT: I don't know what they call it these
11 days, Shepardize or key cite. Judge Irenas recently wrote an
12 opinion on that a few months ago about the citizenship in this
13 context, and I would respectfully request that you should
14 examine whether the citizenship of the beneficiaries is
15 relevant for diversity purposes when the trust is not a party
16 to the case, and then I would ask -- I'm going to ask you and
17 your colleague that the argument being made by the defendant is
18 that the only reason you're seeking to join these beneficiaries
19 is to destroy diversity and remand the case, and I'm suggesting
20 that you look at the case law and examine whether or not the
21 citizenship of the beneficiaries has any relevance to the
22 diversity issue, and if it doesn't, do you still want to join
23 these beneficiaries.

24 MS. LENTINI: Your Honor, respectfully, the two
25 beneficiaries that have already notified us, the secondary

1 beneficiaries, so the Matthew Durst children, they've already
2 notified us that they do not wish to participate as a party to
3 the action. Therefore, whether it went by the citizenship of
4 the trust or the citizenship of the beneficiaries, it becomes
5 irrelevant.

6 There is no -- diversity of jurisdiction is not
7 destroyed at that point, and therefore, actually, the remand
8 back to the State Court would be -- on that issue is not
9 relevant.

10 THE COURT: What about the seven or eight or nine --

11 MS. LENTINI: They're all --

12 THE COURT: -- other people?

13 MS. LENTINI: No. They're all different places.
14 There's no -- diversity is not affected at all.

15 THE COURT: So the only people who might affect
16 diversity are who? Matthew --

17 MS. LENTINI: Matthew Durst's --

18 THE COURT: -- Durst, Jr.?

19 MS. LENTINI: Two children.

20 THE COURT: His two children.

21 MS. LENTINI: His two children.

22 THE COURT: And they're the only two people who could
23 destroy diversity --

24 MS. LENTINI: Yes.

25 THE COURT: -- in your judgment?

1 MS. LENTINI: Out of all of the beneficiaries.

2 THE COURT: So at the end of the day, this remand
3 issue may be moot.

4 MS. LENTINI: Correct, Your Honor.

5 MR. D'ELIA: Correct.

6 THE COURT: Okay. But we're going to follow up by
7 supplemental briefs after this hearing, and I'm going to ask
8 the plaintiffs, you know, to clarify their position about
9 whether they still believe it's necessary or appropriate to
10 join the beneficiaries if their joinder will not impact whether
11 this case is remanded or not.

12 MS. LENTINI: Your Honor, would you like me before we
13 -- would you like me to -- I think it might be -- because you
14 brought this up also, is to directly contact you and receive --
15 provide an affidavit from anyone who wishes to be a party?

16 THE COURT: We'll circle back at the end of this
17 argument or during this argument about that point. That's
18 something that I am considering, because let's assume for the
19 sake of argument you come up with seven or eight affidavits of
20 people who say yes, they want to become parties.

21 MS. LENTINI: Uh-huh.

22 THE COURT: I'm still not convinced yet of a good
23 reason why they should be joined as plaintiffs in the case if
24 they're "merely only beneficiaries", because the trustee, the
25 two plaintiff trustees are there to represent their interests.

1 So why do we need the beneficiaries there?

2 Suppose there were a thousand beneficiaries of this
3 trust. Would all thousand be a plaintiff in the case?

4 MS. LENTINI: They potentially could be, because the
5 Federal rules don't prohibit them from being. The rule
6 provides that the trustee may proceed without naming them. It
7 doesn't prohibit them from listing them, and that does seem
8 absurd when you put it that way. It does.

9 The primary concern here are Mr. Durst's children,
10 the eight of them.

11 THE COURT: Which Durst? We have to be careful.

12 MS. LENTINI: I'm sorry.

13 MR. D'ELIA: Yes.

14 MS. LENTINI: Steven Durst's children, does not
15 destroy diversity, but there was no way to bring this without
16 -- we couldn't list eight and say, you know, the rest of you
17 not --

18 THE COURT: Why not?

19 MS. LENTINI: Why not? Because then it would be in
20 front of you, and you'd be asking me why didn't you list the
21 rest of them. I -- the rule is to put more people on notice
22 than less people --

23 THE COURT: One --

24 MS. LENTINI: -- but --

25 THE COURT: One way the Court can handle this is to

1 say -- and I don't know which way I'm going to rule right now,
2 but one way I could handle this is to say if the Court decides
3 that the beneficiaries should be plaintiffs, if they want to,
4 that the amendment is granted only as to those plaintiffs who
5 submit affidavits saying they want to be a party to the case.
6 That's one way to handle it, or the other thing is to say that
7 in the Court's discretion, we don't need them and it will just
8 unduly complicate the case and the request is denied.

9 I don't know which way I'm going to rule on that
10 issue, but --

11 MS. LENTINI: And Your --

12 THE COURT: -- I think what we have clarified though
13 is that no matter how this motion winds up, a remand issue is
14 going to be moot --

15 MS. LENTINI: Correct.

16 THE COURT: -- seems to me. Okay. All right. Let's
17 -- we're still on this beneficiary issue. Let's go to defense
18 counsel, what you have to say about it. I mean, it's -- now
19 it's -- now the plaintiffs are acknowledging that your clients
20 -- are they both children of Matthew Durst?

21 MS. LENTINI: Yes, Your Honor.

22 THE COURT: Okay.

23 MR. YACOVELLE: Actually, there are three, Judge.

24 THE COURT: Okay.

25 MR. YACOVELLE: He has a minor who we had to cross

1 out papers and another minor who just became an adult, and then
2 he's got the third son that's at the University of Delaware who
3 filed a separate affidavit. All three of them want no parts of
4 it as well as, by the way, I believe that we filed an affidavit
5 from a Mrs. Nagua (phonetic), who had two of the proposed named
6 beneficiaries. She wanted no parts of it on her behalf, and I
7 saw a copy of a letter from a man named Rayle (phonetic) who
8 lives out in Wisconsin who sent a letter to Mr. D'Elia telling
9 him that he'd heard that he was going to be a plaintiff and
10 that he wanted no parts of it.

11 THE COURT: Can you give me the names first of your
12 client's three children?

13 MR. YACOVELLE: Yes. Benjamin.

14 THE COURT: Benjamin C. Durst?

15 MR. YACOVELLE: Right. Thomas.

16 THE COURT: Thomas S. Durst?

17 MR. YACOVELLE: Yes. And Matthew, Jr.

18 THE COURT: I don't see -- oh, is that Matthew R.
19 Durst?

20 MR. YACOVELLE: I guess it is. Yes. Yes.

21 THE COURT: Okay. Those are the three children of
22 your client who you strongly suspect don't want to sue their
23 father.

24 MR. YACOVELLE: Right. And by the way, they are the
25 only people in this application who have anything to do with

1 diversity, because they live in Connecticut, like their father,
2 domiciled.

3 THE COURT: I think we're agreed that that issue --

4 MR. YACOVELLE: Yes.

5 THE COURT: -- is now moot.

6 MR. YACOVELLE: Right.

7 THE COURT: I don't think we have to go there.

8 MR. YACOVELLE: Right. In which case, other than one
9 point, I don't have anything else to add on this beneficiary
10 issue, and that is, since Your Honor is considering different
11 ways to do it -- deal with it, if these beneficiaries came
12 forward in the Superior Court of New Jersey and said they
13 wanted to be heard, made application of any kind whatsoever to
14 that Court and were turned away, I must have been in a coma
15 somewhere, because I never heard of it. Didn't happen.

16 THE COURT: Okay. So we're going to circle back
17 about this beneficiary issue, but we've already addressed it.
18 The next issue I'd like to address is the request to amend the
19 complaint to add the two law firms and Kelly Peck. Is that a
20 Ms. Peck? Is Kelly a woman?

21 MR. D'ELIA: It's --

22 MR. YACOVELLE: Yes.

23 MR. D'ELIA: -- Ms. Yes.

24 THE COURT: Okay. And as I understand it, plaintiff,
25 the allegation is it's a malpractice claim against them. I'm

1 hearing that they what, drafted the trust documents?

2 MR. D'ELIA: Yes, Your Honor. Without getting into
3 an enormous amount of detail, there was a letter from Kelly
4 Peck wherein she recommended that the trust contain certain
5 provisions, and the actual trust documents are missing most of
6 those provisions resulting in a situation that caused losses to
7 the trust.

8 In addition, she gave an opinion letter with regard
9 to valuation of certain assets wherein she indicated she had
10 reviewed certain documents, which, if she had reviewed them,
11 she would have found there was a provision that would have
12 greatly diminished the value of that particular asset. So we
13 believe that there is a claim against her for that, and that's
14 why we're --

15 THE COURT: Did Ms. Peck work for these two firms?

16 MR. D'ELIA: Yes.

17 THE COURT: For both of them?

18 MR. YACOVELLE: Successively.

19 MR. D'ELIA: She went from one to the other. That's
20 -- am I answering your question?

21 THE COURT: Is there any objection to the amendment
22 to name these three "legal malpractice defendants"?

23 MR. YACOVELLE: Judge, I don't speak for any of them
24 up there, and so I'm really not in much of a position to
25 object. It's --

Yacovelle - Argument

24

1 THE COURT: Yes, you are. You're the defendant.

2 MR. YACOVELLE: Well --

3 THE COURT: You can object on -- it will make the
4 case unduly complex --

5 MR. YACOVELLE: It will make it -- yes.

6 THE COURT: -- et cetera, et cetera.

7 MR. YACOVELLE: Well, it's going to get unwieldy
8 enough anyway. So -- on other matters. So I don't have
9 anything in particular to offer there except to point out --
10 and it's pretty interesting -- that the plaintiffs who claim
11 that a certain asset is worth a ton of a money --

12 THE COURT: We'll get into that.

13 MR. YACOVELLE: -- are now complaining --

14 THE COURT: We'll get into that. We'll get into that
15 issue, but I'm hearing that you don't object to the joinder of
16 these three legal malpractice defendants.

17 MR. YACOVELLE: No. I need company, Judge.

18 THE COURT: So that will be granted except,
19 plaintiff, I'm going to ask you to properly plead the
20 citizenship of these three proposed additional defendants. I
21 think your amended complaint says something to the effect that
22 she's a Connecticut lawyer and these are Connecticut law firms.

23 MR. D'ELIA: Got you.

24 THE COURT: I don't think that satisfied the
25 jurisdictional requirements. So we'll just have to clarify

1 that to make it comply with the applicable law.

2 Now I think we get to the -- maybe the most
3 contentious issue, and that's plaintiff's request to join Mr.
4 Yacovelle as a defendant in the case, and what flows from that
5 is if that's granted, whether or not he necessarily must be
6 disqualified. Plaintiff, tell me if I'm summarizing, and if
7 I'm not, I want to hear it from you, the essence of the
8 plaintiff's claim against Mr. Yacovelle.

9 I think what I understood from reading the pleadings,
10 proposed pleadings and your brief, is that Mr. Yacovelle
11 represented Matthew Durst in connection with this litigation
12 that was filed in State Court in Cumberland County. That case
13 was eventually settled, and I know defendant is going to want
14 to get into the collateral estoppel issue, but that's an issue
15 for Judge Simandle.

16 My understanding of your claim is, and I want you to
17 correct me if I'm wrong, is that you're saying that Mr.
18 Yacovelle as the attorney for Mr. Durst should have taken
19 certain actions in that case that he didn't take and/or should
20 have notified your clients of certain developments in that
21 case, which he didn't do. So help me understand what you're --
22 if I'm understanding your claim against Mr. Yacovelle
23 correctly, and what is your claim about?

24 MR. D'ELIA: Okay. Mr. Yacovelle represented Matthew
25 Durst in his capacity as trustee. The real -- the party -- I'm

1 using this term loosely -- in interest, if you will, was the
2 trust, not Matthew personally. In represent --

3 THE COURT: But there's no dispute about that.
4 That --

5 MR. D'ELIA: No. No. No. But --

6 THE COURT: That's how the complaint was captioned.
7 He represented Matthew Durst as a trustee.

8 MR. D'ELIA: Okay. So -- and Matthew Durst as the
9 fiduciary who had a responsibility to the beneficiaries and to
10 the trust. During that -- during that -- the trust documents
11 are very clear that two trustees have to make the decisions.
12 That was ignored by Matthew Durst and his attorney.

13 There was provisions that certain assets were pledged
14 as collateral to the grantor that were dissipated in the course
15 of the settlement without any consultation with the -- with the
16 other trustee or with the creditor of that particular asset.

17 There was -- additionally, in settling the case, they
18 had failed -- like I said, failed to consult with the other
19 trustee, didn't consider the valuations that were put on the
20 properties in making the settlement. We believe that there are
21 a whole series of breach of fiduciary obligations by Matthew
22 and his then attorney.

23 THE COURT: So my question is everything you just
24 said, those are questions of fact, and they're going to be
25 issues that may or may not be litigated in this case.

1 MR. D'ELIA: Correct.

2 THE COURT: Aren't those claims against Matthew?
3 You're saying Matthew breached those duties, Matthew entered
4 into the settlement without authority., Matthew undervalued
5 this property, Matthew didn't act in the best interest of the
6 trust. I understand that claim. How do you get a claim
7 against Mr. Yacovelle? He's an attorney for Matthew Durst.
8 He's not your client's attorney.

9 MR. D'ELIA: My client being the trust? He certainly
10 was the attorney for the trust, and in representing the trust,
11 he failed -- he failed to discharge his --

12 THE COURT: Why is he an attorney for the trust? The
13 plaintiff in the case --

14 MR. D'ELIA: -- is Matthew Durst, trustee.

15 THE COURT: -- is Matthew Durst as a trustee.

16 MR. D'ELIA: Of the trust.

17 THE COURT: He has represented one trustee in the
18 case. In fact, the trust was dismissed as a party. So he
19 couldn't represent the trust.

20 THE COURT: Well, on the -- the technical legal basis
21 that a trust doesn't have standing, that the right way to do it
22 is in the name of the trustee, but at the end of the day, it
23 was the trust and the trust assets, and in representing that
24 trust, he disregarded his obligations to the trust, and you
25 have another trustee --

1 THE COURT: Who's he? Matthew -- yes.

2 MR. D'ELIA: Yes.

3 THE COURT: Yes. Matthew Durst, Jr., yes. Your
4 claim is he disregarded his obligations to the trust and the
5 trustees. Understand the claim. That's going to be litigated.

6 MR. D'ELIA: Correct.

7 THE COURT: How do you get to Mr. Yacovelle? He's
8 the attorney.

9 MR. D'ELIA: The attorney -- the for the trust
10 disregarded the trust documents in settling a case. The
11 attorney for the trust disregarded the asset that was pledged.
12 The attorney for the trust said the loan that was the basis for
13 the -- that the collateral was based upon had been paid in full
14 when his own accounting showed it wasn't paid in full. These
15 are all acts of malpractice against the trust.

16 Now, all as I want is my day in court to present
17 that. I'm only asking to amend the complaint so I can present
18 -- so I can make that claim, and that claim is against the
19 attorney who committed those acts of malpractice against the
20 trust. The other trustee is now -- the other trustees are now
21 claiming that he acted in -- he committed malpractice by
22 engaging in these acts. If the Court later concludes that
23 that's not an act of malpractice, I understand it. Today, I'm
24 just asking to let me amend the complaint to assert it.

25 THE COURT: Here's what I'm wrestling with, counsel.

1 Mr. Yacovelle represents Matthew Durst as a trustee. As far as
2 I can see, he never represented in any of the papers that he
3 represented Reuben or Steven Durst. I'm assuming -- and I
4 could be wrong -- that Mr. Yacovelle is going to stand up and
5 say Matthew Durst had the authority to act as he did and he
6 didn't need the permission of the other trustees, but that's
7 going to be an issue that's going to be litigated.

8 If Mr. Yacovelle's client was Matthew Durst only, how
9 can two nonclients sue him for malpractice? His -- if you were
10 representing Matthew Durst and Matthew Durst was saying Mr.
11 Yacovelle committed malpractice, that's a no-brainer, right?
12 But your clients are not in an attorney/client relationship
13 with Mr. Yacovelle. So how could they have a basis for
14 asserting a malpractice claim against him? That's what I'm
15 wrestling with.

16 MR. D'ELIA: I understand what you're wrestling with.
17 Let's take your example from earlier. Suppose there were a
18 thousand trustees, and it said it has to be -- decisions have
19 to be made by a majority of the thousand trustees and Mr.
20 Yacovelle took one trustee, represented the one trustee,
21 depleted the trust assets, disregarded the loan and the
22 collateral and committed what we can -- we believe are the acts
23 of malpractice in representing the trust's interests without
24 regard to all those other trustees. You're telling me the
25 other 999 trustees have no claim against him. I disagree, and

1 I disagree, because, in essence, he was representing the trust,
2 Matthew Durst, trustee, and he -- he reads the document. It
3 says decisions have to be made by two. I'm just going to go
4 with the one, and I'm going to make decisions that are going to
5 result in substantial assets being depleted. I'm going to
6 allow the collateral to be sold -- to be conveyed despite the
7 fact that there's a lien -- there's a security interest against
8 it, et cetera, et cetera, et cetera. These are acts of
9 malpractice that the -- if the -- the trustees have to -- they
10 have to be able to assert that claim.

11 And you're right. When he says I only represented
12 one of the thousand trustees, so only that one can sue him, I
13 disagree. His acts were against the trust.

14 THE COURT: The -- well, that's going to be the --
15 probably the key question. You're saying that Mr. Yacovelle
16 not only represented Matthew Durst, but he also represented
17 Steven and Reuben Durst. That's what you're saying.

18 MR. D'ELIA: I'm saying he had an obligation to
19 represent them by virtue of the fact that he was representing
20 Matthew in his capacity as a trustee. If I had a document that
21 says decisions can only be made by me and you and I, as the
22 attorney, went and let the decisions be made by one and I
23 proceeded against the third -- that third party, that third
24 party absolutely has that claim.

25 In this case, it's a trust instrument. He had an

1 obligation to the trust, and again, I'm not here to argue the
2 case. I'm here to argue please let me have my day in court on
3 that issue, and I believe it's a legitimate issue. Did he
4 represent the trust or not represent the trust, and if he
5 represented the trust, we respectfully submit he committed
6 malpractice in that representation.

7 THE COURT: You are going to have your day in court,
8 because no matter what happens with the joinder of Mr.
9 Yacovelle, you're going to make this claim against Mr. Durst,
10 Mr. Matthew Durst. You're going to say Mr. Matthew Durst, you
11 didn't have authority to act in that State case without the
12 approval, authority, what have you, of Steven and Reuben. So
13 you're going to have your day in court. The issue --

14 MR. D'ELIA: I want my day in court against the
15 attorney who disregarded the trust documents in allowing that
16 to happen.

17 THE COURT: A legal issue is going to be what duty
18 Mr. Yacovelle owed to Steven and Reuben. That's the legal
19 issue, did he owe a duty to them. There's no question he owed
20 a duty to Matthew Durst. That was his client.

21 MR. D'ELIA: To the disregard of the trust. To the
22 detriment of the trust. I respectfully disagree, because the
23 end of the day, he was representing the trust, and he failed in
24 discharging that obligation.

25 THE COURT: Okay. Let's hear from Mr. Yacovelle --

Yacovelle - Argument

32

1 MR. D'ELIA: Thank you.

2 THE COURT: -- and then we'll come back.

3 MR. D'ELIA: Thank you, Your Honor.

4 MR. YACOVELLE: Judge, I didn't go into any response
5 on this issue in the brief simply because I'm a little
6 squeamish about it, and I don't want to be in a position of
7 making arguments when I obviously have a personal interest in
8 the success of the arguments, and so I didn't go into any
9 detail about it, but Your Honor has hit on the issue, which is
10 from the very first minute of my involvement in this case, I
11 was told I would be appearing from Matthew Durst, the trustee,
12 the trustee of the Jake Ball Trust. Heard that from none other
13 than Steve Durst, who at the time represented himself as
14 grantor, but we now learn maybe he was even a trustee, maybe.
15 I'm not conceding that, but we'll see how that turns out.

16 Anyway, and if you look at any of the documents, any
17 of the assets that were obtained, anything that was put into
18 the trust, all the paperwork says Matthew Durst, trustee, owns
19 a ten percent interest, Matthew Durst, trustee owns a 20
20 percent interest, Matthew Durst, trustee had to sign the notes
21 on the 1600 building and so forth, and this other fellow never
22 appeared until after the case was settled, Reuben. Never heard
23 him. Didn't know him. Never met him. Never reported to him.

24 And, by the way, when this -- when this trust
25 agreement surfaced, which happens, by the way, to have been

1 after the case was settled, it doesn't say that it requires two
2 people to decide the case. It says that no one can question
3 the authority of the trustee, the trustee, either of them
4 really, I guess, on the papers, to settle the case. And so the
5 representation was made at a settlement conference and in court
6 by Matthew that he had authority to settle the case, which, if
7 you read the documents, he did, and he settled the case.

8 Now, if Matthew came along and said well, my lawyer
9 told me I could do this and I shouldn't do that and he was
10 wrong and I believed him and I went ahead and settled this case
11 but I wouldn't have except for his bad advice, now we have
12 Matthew sitting with a cross-claim, I guess, or a third-party
13 claim, some kind of a claim against me for negligence in
14 advising him. We would have that situation. How we get to a
15 duty to these other two gentlemen is a serious question.

16 Now, I understand that the cases out of New Jersey
17 and this Court are very liberal when it comes to amending
18 complaints, and I also understand that in the context of
19 malpractice actions by your client, that can be going on right
20 during the course of a trial where you're still representing
21 your client. That's Circle Motors, Mystic Island. Those are
22 New Jersey cases, and there's also cases out of this Court,
23 and, in fact, it has to, because if -- if the claim exists and
24 is a known claim by a party that has a justiciable interest and
25 he doesn't bring it, it's barred even though it creates all

1 kind of confusion during the case, because he's suing his own
2 lawyer, and that, of course, is a consequence of the entire
3 controversy doctrine, which is a New Jersey doctrine which is
4 followed in this Court.

5 So if you have a legitimate claim, you have to make
6 it. If it throws the case into confusion and turmoil, that's
7 something under Federal case and State cases -- Justice Handler
8 wrote most of these decisions, by the way -- the Court is
9 supposed to manage. He doesn't say you can't bring the claim,
10 because you're on record now. You've made your claim and there
11 you are, but the Court can then say well -- and it's also under
12 I guess Rule 42 maybe. I could be wrong about that number --
13 can lead to bifurcation, can lead to separating out the
14 malpractice claims from the other claims, and remember here,
15 we've got a jury demand and we've got the whole rest of the
16 case, nonjury, equitable issues and that kind of thing.

17 So there are ways to deal with it. If it's a
18 legitimate claim, there are ways to deal with it, but it's
19 really not a valid claim if there's no attorney/client
20 relationship, if there's no duty, and the -- basically, the
21 claim is saying well, I didn't advise Matthew. They don't know
22 what I advised Matthew. Matthew hasn't testified to any of
23 this stuff, and they'll find out when they take his deposition,
24 but -- and it won't be too late then for that matter if they
25 come up with some ground to amend.

1 THE COURT: I think the issue that I want to focus on
2 is the futility argument and did you owe a legal duty to Steven
3 and Reuben Durst which would give them standing to assert a
4 legal malpractice claim against you. That is the issue that
5 I'd like to focus on, and we can get to the management issues,
6 the severance issues at some other time, if necessary.

7 But do you believe that you had a legal duty to
8 Steven and Reuben such that they have standing to assert a
9 legal malpractice claim against you?

10 MR. YACOVELLE: I don't see what it could have been
11 founded on. First of all, Steven got me into it, because he
12 had a conflict as the grantor. That's what he said to me. So
13 he gets me into the case, and from then on, my primary job is
14 keeping him at a distance, because he tries to run everything,
15 and so therefore, I have to keep -- keep my client on course,
16 and there was never any question that Steve Durst thought for
17 one second that I was representing him. Now -- he comes along
18 now and he says oh, by the way, I was a trustee the whole time,
19 which is kind of interesting, and if he was a trustee the whole
20 time, had I known that he was a trustee the whole time, had he
21 known that he was a trustee the whole time, then we might have
22 gotten into some situation where I was representing two
23 trustees, because he was a -- but, of course, then there would
24 have been a conflict anyway, because he had -- he had certain
25 conflicts. He was a creditor of the trust. He had various

1 conflicts. So I don't see any way there's a duty to him.

2 Now, this other fellow, I've described him not
3 unkindly, but accurately in various filings. The trustee,
4 Reuben Durst, as being inert, not just immobile but inert. He
5 was down in Georgia. He had written or signed a letter through
6 the trust attorneys in Connecticut confirming what he had told
7 Matthew, which is you take care of this, I don't want anything
8 to do with it, and he never had anything to do with it except
9 borrow money a couple times through straws.

10 I don't know where I could get a duty as far as he's
11 concerned. I'm still -- I don't believe I've ever heard from
12 him outside of in these pleadings.

13 So I think if the Court is focused on this question,
14 that probably it ought to be briefed. I don't think it's been
15 briefed by anybody, and I think it's significant, and that
16 would be my suggestion. I'm just saying -- and I'm talking a
17 lot of facts here, because I don't know how else to answer the
18 question.

19 THE COURT: If you're joined, does it necessarily
20 result in your disqualification?

21 MR. YACOVELLE: No. It almost necessarily doesn't.

22 THE COURT: You think if you're a party defendant,
23 you can also represent your client?

24 MR. YACOVELLE: Yes. I think he can -- he can give
25 informed consent to that representation, number one, and number

1 two, they've gone -- they've gone one step further than they
2 probably should have, because if I'm a defendant, then there's
3 no question I can testify. I'm representing myself pro se.
4 There's no question I can try the case, and if some of it
5 washes off onto Matthew, too bad, whereas if I weren't a
6 defendant and they came in with this argument, they might be in
7 a better position, but that's a question that -- whether I'm
8 defendant or not is something I think should be briefed
9 further.

10 THE COURT: You think that if you're -- if, capital
11 I, capital F -- you're a defendant, you think your client can
12 give informed consent to you still representing him?

13 MR. YACOVELLE: I believe so. Yes, because actually,
14 he's already done it in an affidavit. He's already filed an
15 affidavit in response to this motion. We've been over all of
16 this though. There's no distance between us. There's no
17 daylight between us. They may think there is, but that's
18 fanciful. They don't know a thing about our conversations.

19 So there's no distance between us, and he I'm sure
20 could do that, but the -- see, my position as a defendant is a
21 lot stronger than the position of the lawyers in the cases that
22 were cited here. First of all, the -- oh, the decision by
23 Magistrate Judge Rosen, which was -- they're all Italian cases,
24 by the way, every one of them, plus me and Mr. D'Elia and Ms.
25 Lentini. Italian case.

1 All right. That's Vacarelli (phonetic). Vacarelli
2 is a case where the Court said that the attorney was going to
3 be disqualified because he was a necessary witness.
4 Subsequently, several years later, Judge Debevoise wrote an
5 opinion in a case called Main Events, and he didn't follow
6 that. He -- matter of fact, he reversed the Magistrate Judge
7 who had followed it, and he --

8 THE COURT: I've written on this issue. I mean, I
9 know the distinction between discovery and trial.

10 MR. YACOVELLE: Right.

11 THE COURT: I know what you're talking about.

12 MR. YACOVELLE: Right. So --

13 THE COURT: But if you're a party defendant, you're
14 going to testify at trial.

15 MR. YACOVELLE: Oh, I know. I know. So let me say
16 this. In the interest of sound judicial management, there --
17 there were a lot of difficult things that happen if --
18 depending upon how these motions are decided, and it's
19 significant enough that I don't think it would kill us to brief
20 the duty issue, because there may be some need for some
21 affidavits, some factual stuff and so forth, you know.

22 But other than that, no. I think -- I think if I'm a
23 party, I really don't know, you know, what options the Court
24 would take, but I do know that I would be able to participate
25 in the case. Have to.

1 THE COURT: Okay. Thank you, counsel. Last word,
2 counsel.

3 MR. D'ELIA: Just -- and I -- and I know you've got
4 the case down pretty pat. Judge, the issue with regard to the
5 attorney/client relationship, I respectfully submit if I am an
6 attorney and I am given a document that says decisions have to
7 be made by two people in order to effect these assets and I
8 turned around and ignore that document and say I'm just going
9 to go with this guy because I didn't talk with the other guy,
10 he's been absent, I think that's an attorney's breach of his
11 obligation as an attorney, and to deny that third party, in
12 this case, Reuben, his day in court, and Steve, by the way,
13 would be a great injustice.

14 All as I'm asking you to do is allow me to amend the
15 complaint to join him. If you -- if we want to address the
16 issue that one of the defenses that are going to be raised by
17 Mr. Yacovelle is that there was no attorney/client
18 relationship, let the -- let us do the discovery and let us get
19 to that issue, but not for today. Today I'm simply asking you
20 to recognize that I should have my day in court against Mr.
21 Yacovelle.

22 This dovetails with what I hadn't argue, and I'll be
23 very brief, is the issue as to whether he's joined or not
24 joined -- and I think he has to be joined -- whether or not he
25 can continue to represent Mr. -- Matthew, and Your Honor

1 touched on it. Can you seriously say that he's made an
2 informed consent? Does Matthew -- does Matthew understand that
3 to the extent there's a balance due on the loan to Steve Durst,
4 that Matthew is personally liable and that in entering into
5 that settlement, he put himself personally in harm's way? Does
6 he, Matthew, understand that he has a cross-claim against Mr.
7 Yacovelle as a co-defendant in this case?

8 We have to know what happened in that settlement room
9 when that case was settled and whether or not these things were
10 explained to him. Mr. Yacovelle has those conflicts, and he
11 has to testify in the case.

12 His only argument in -- the real argument in his
13 pleadings is it's going to work a hardship for him to find
14 another attorney, and in his pleadings, Matt says I don't know
15 any attorneys. There's a Martindale-Hubbell book and there's a
16 phone book filled with them. You throw a stone from here and
17 you'll hit somebody.

18 THE COURT: You're showing your age by relying on
19 Martindale-Hubbell.

20 MR. D'ELIA: Exactly. It's now lawyers.com, I
21 believe. I show my age in a lot of ways, Judge. With that,
22 Judge, I will submit for your -- for your consideration.

23 THE COURT: You want to add something, counsel?

24 MS. LENTINI: I always have something to say, Your
25 Honor. There were just a couple other points and one being

1 that in the State -- the first thing is the second amended
2 trust agreement on the first page -- can't miss it -- says that
3 they are trustees. Reuben Durst and Matthew Durst are
4 co-trustees. First page, very easy, and the representation
5 went on for years.

6 The second issue that came up was that during the
7 State litigation is that Mr. Yacovelle took the position and
8 argued against the -- that there had to be -- they were
9 co-trustees and that there had to be authority to enter into
10 the settlement agreement by both Matthew Durst and Reuben
11 Durst. There was argument against that, and the argument was
12 that he had authority -- apparent authority.

13 The trust document itself states that the waiver must
14 be in writing. At no time did Mr. Yacovelle put that
15 representation or that part of the trust agreement before the
16 State Court, and, in fact, Judge McDonnell in the State Court
17 stated in her memorandum opinion that the Court and the
18 mediators and the defendants relied upon the apparent authority
19 of Mr. -- of Matthew Durst to represent that trust.

20 Another -- one of the other things that also became
21 very striking was Matthew Durst filed a motion for partial
22 summary judgment. I did not supplement, because we just got
23 that after this whole part, but in that, there's a statement of
24 facts, and then there's a ten-page additional statement of
25 facts which is just all paragraphs, and basically, what that

1 is, in fact, is Mr. Yacovelle announces to the Court that he
2 thinks its relevant that the Court know the background of the
3 State litigation, and of course it's relevant. It's not in
4 numbered paragraphs so that we can respond to it. He claims to
5 the Court that they're undisputed facts.

6 What he did was submit ten-page submission of
7 testimony. He testified in his motion for summary judgment
8 when he's arguing against the trust who had come forward and
9 said we have a co-trustee, Judge McDonnell, we are to be
10 represented, he -- they do not have authority, and the attorney
11 for the trust is turning around saying no, even though page 1
12 says you're co-trustee and page 6 says that it must be in
13 writing to waive that right, the attorney for the trust stood
14 before the State Court and argued oh, no, no, no, we don't need
15 that.

16 And the State Court went forth on -- relied -- they
17 made a mistake. They clearly made a mistake. They relied upon
18 an apparent authority which was presented, and Mr. Yacovelle
19 had the knowledge. He is an excellent attorney. He's
20 obviously read all of these documents, and obviously, he would
21 have read the first page, and he would have read the other part
22 that requires that it be written.

23 Also in his motion for summary judgment, Mr.
24 Yacovelle in December of 2011, he submitted as an attachment a
25 certification, his certification, and in his certification, it

Lentini - Argument

43

1 says, "I've always taken the position that if acceptable
2 documents are present --" this was regarding enforcement of the
3 settlement "-- and if Matthew Durst is still a trustee, though
4 his resignation has been demanded --" that's another issue. It
5 was demanded.

6 So -- and he continued to go forward. "-- he is
7 still a trustee, and if I am still in the case (I am), though
8 individuals posing as co-trustees attempted to fire me, an
9 effort I rejected when they proved to --"

10 THE COURT: What are you quoting from?

11 MS. LENTINI: "-- when they proved to be without
12 credentials --"

13 THE COURT: What are you quoting from, counsel?

14 MS. LENTINI: Excuse me?

15 THE COURT: What are you quoting from?

16 MS. LENTINI: I'm quoting John Yacovelle's
17 certification in response to notice of motion to enforce
18 settlement dated December 14, 2011.

19 THE COURT: This is in the State Court proceeding,
20 correct?

21 MS. LENTINI: It's attached as Exhibit C to Mr.
22 Yacovelle's motion for partial summary judgment before this
23 Court. So he --

24 THE COURT: We'll get there.

25 MS. LENTINI: He placed it before this Court.

1 Anyway, so there are issues that he chose as the attorney and
2 he had the knowledge and he made representations before the
3 Court, before the mediators, to opposing parties. He's
4 acknowledged in certifications that co-trustees came forward
5 and tried to fire him and tried to stop Mr. Durst. So he --

6 MR. D'ELIA: Matthew.

7 MS. LENTINI: I mean Matthew Durst. So he marched
8 forward. What was his duty to the co-trustee? What was his
9 duty to the mediators? What was his duty to the State Court?
10 He had duties to all of them. He can't just say I represented
11 Matthew Durst. Matthew Durst doesn't exist in a bubble. He is
12 -- he represented the trust.

13 THE COURT: One more question before we get to you,
14 Mr. Yacovelle. At the end of the day, when you put together
15 all of plaintiff's claims in this case, how much money is
16 plaintiff asking for in this case? What's the case worth?

17 MR. D'ELIA: In excess of a million dollars.

18 THE COURT: In excess of a million dollars?

19 MR. D'ELIA: Yes.

20 THE COURT: Okay. Mr. Yacovelle, I know you want to
21 respond.

22 MR. YACOVELLE: Judge, I just want to say two things.
23 The first thing I want to say is this scenario of me and the
24 Judge and having this conversation and showing papers and this
25 and that, never happened. Now, that's one of the problems when

1 somebody comes into the case late in the game. No one was
2 there from that table at that time. So I just want to make
3 that comment.

4 Now, the second thing I want to say is this. You
5 want to -- want to argue the motion for partial summary
6 judgment right now? I'm ready.

7 THE COURT: No. We can't do that. That's -- that
8 has to be briefed, and Judge Simandle is going to decide that.

9 MR. YACOVELLE: Everything has been in, by the way.
10 Everything has been filed that can be filed.

11 THE COURT: Okay. Thank you, counsel. I said I'd
12 circle back at the end of this argument, and that's what I want
13 to do now and have a plan going forward.

14 The first proposed amendment was to add Steve Durst
15 as a plaintiff in a trustee capacity. That's eventually going
16 to be granted. I'll issue an order to that effect when we file
17 the amended complaint. There's no opposition.

18 The second issue is whether these beneficiaries
19 should be added as plaintiffs. It's conceded as of this point
20 that Matthew Durst's three children are not going to be added.
21 I don't know if we have an affidavit from the minor, but I
22 think plaintiffs are conceding that point.

23 If the Court grants the amendment to join the
24 beneficiaries as plaintiffs, it will indicate in the order that
25 only those plaintiffs that submit affidavits saying they want

1 to be plaintiffs will be joined, but I still have to make the
2 decision whether any beneficiary is going to be joined, and I'm
3 reserving on that issue.

4 The request to join Halloran & Sage, Robinson & Cole,
5 and Ms. Peck, there being no opposition, the Court is going to
6 grant it, except when the amended complaint is filed, the Court
7 is going to ask plaintiffs to properly plead the citizenship.

8 As to the request to add Mr. Yacovelle, I am going to
9 ask the parties for additional briefing on that. I'm not
10 comfortable on this duty issue. I'd like to give the parties
11 an opportunity to brief it and to submit authority in support
12 of their position. Plaintiffs, you're saying that Mr.
13 Yacovelle owed a legal duty to your two clients. I'd like to
14 know the legal support for that. Mr. Yacovelle, you deny that.
15 I'd like to hear your response.

16 In addition, counsel, during oral argument, you were
17 citing to certain pages either reading or orally from the State
18 Court litigation. I think you said something about Judge
19 McConnell's opinion or decision, and if you're going to rely on
20 that, I'd like to see it. I can get the affidavit from Mr.
21 Yacovelle from the summary judgment briefs. So you don't need
22 to submit that again, but -- I'll get that, but I don't have --
23 if you're relying upon some sort of oral or written opinion
24 from State Court, I'd just like to see it.

25 And then I want to give you an opportunity to also --

The Court - Decision

47

1 if you want to add anything to the argument, that if the
2 request to join Mr. Yacovelle is granted, whether or not he
3 necessarily must be disqualified. Defendant has argued that
4 his client can give informed consent to that. I'm not at the
5 moment entirely comfortable with that, but I'd like to get
6 plaintiff's position why it's -- why Mr. Yacovelle must
7 necessarily be disqualified if he's joined, and Mr. Yacovelle,
8 I'd like to get your legal support opposing that and support
9 for your position which the Court is just not entirely
10 comfortable with at the moment that your client can give
11 informed consent to that.

12 Plaintiff, how long do you want to submit a
13 supplemental brief?

14 MR. D'ELIA: In your discretion, Your Honor, but I
15 would ask for 30 days.

16 THE COURT: Do you need -- I --

17 MR. D'ELIA: No.

18 THE COURT: -- have no problem giving you --

19 MR. D'ELIA: No.

20 THE COURT: -- enough time, but I would like to
21 address this issue so we can get to the merits of the case. Do
22 you need 30 days? I mean, if -- I don't think you need 30 days
23 for this issue, because you've already addressed it. How about
24 two weeks?

25 MR. D'ELIA: Fine.

The Court - Decision

48

1 THE COURT: All right. Do you want two weeks to
2 respond, Mr. Yacovelle? And then if I need more oral argument,
3 I'll let you know.

4 MS. LENTINI: Your Honor, this is just procedurally.
5 If the Court chooses to allow the beneficiaries to be joined
6 and affidavits are required to name them as parties, then
7 generally, we file the amended complaint immediately, but I
8 wouldn't be able to do that unless --

9 THE COURT: Until you get the affidavits.

10 MS. LENTINI: Yes. So I just would need extra time
11 for that.

12 THE COURT: We'll work on that.

13 MS. LENTINI: Okay. Thank you.

14 THE COURT: Okay. So we know there's going to be
15 some amended complaint. The question is how extensive it's
16 going to be.

17 Okay. So anything else on the motion, counsel?

18 MS. LENTINI: We had also discussed earlier for the
19 -- no. We're fine.

20 THE COURT: So that takes care of the motion, but I
21 would like to say one more thing. We don't usually get
22 involved in family spats in this Court, although it does
23 happen, and I've seen cases like this in practice for 26 years
24 and on the bench for six years, and I can tell you invariably
25 what happens. The parties come in and they're litigating all

Colloquy

49

1 over the place, Cumberland County, Connecticut, New Jersey
2 State Court, New Jersey Federal Court, and everybody beats
3 themselves up for a couple years, and two or three years down
4 the road, everybody looks in the mirror and says why in the
5 world did we do this, why did we enrich the pockets of the
6 lawyers with all these transaction costs and why two or three
7 years ago did not we sit down and try and work this out.

8 And I see the handwriting on the wall in this case.
9 I just see it, because I've been through it so many times
10 before, that this case is going to be incredibly contentious.
11 The transaction costs are going to be tremendous. There's
12 going to be motions. There's going to be delays, and it's not
13 cheap, and the lawyers are going to be paid a lot of money, and
14 invariably, two or three years from now after there's been a
15 lot of bloodletting, I'm going to say to the parties are you
16 ready to talk settlement, and they'll say yes, and I always
17 wonder why parties do that. Why don't they just reflect and
18 take a deep breath and push away from the table and say we're
19 brothers, we're uncles, we're aunts, we're related by blood, do
20 we really want to go through this for another two or three
21 years, and I would just ask the parties to reflect on that.

22 I'm guessing -- I don't know for us. Mr. Steven
23 Durst, is that you?

24 MR. D'ELIA: Yes.

25 MR. S. DURST: It is me, sir.

Colloquy

50

1 THE COURT: And I just -- I just -- time and time and
2 time again I see it, and the transaction costs in this case are
3 going to be in the -- likely in the hundreds of thousands of
4 dollars, and you're all intelligent. You're all professionals.
5 I know you disagree, but parties can disagree and still act
6 professional and cordial, and I just wonder why you don't just
7 sit down.

8 Is a million dollars a lot of money? Of course it
9 is. It's a tremendous amount of money, but at the end of the
10 day, you're going to spend, three, four, five hundred thousand
11 in transaction costs. What's left? And all the grief that
12 comes with the case and my -- we're here. We're going to move
13 the case. We're going to decide the case, but I just wonder if
14 you want to take a deep breath and say to yourselves is there a
15 way we can sit down and try and work this out.

16 If you think you -- if you think I can help, I'll be
17 happy to have a settlement conference, but my position on cases
18 is you file a case, you have a right to pursue it. The case is
19 going to move along unless you reflect and talk to each other
20 and say why don't we see if we can work this out before, as
21 they said in the Godfather, we go to the mattresses.

22 So that's all I have to say, counsel. If I can help
23 in that regard, just let me know. Anything else we need to
24 address?

25 MR. D'ELIA: Thank you, Your Honor.

Colloquy

51

1 MR. YACOVELLE: Thanks, Judge.

2 THE COURT: Thank you. We're adjourned. I'll enter
3 an order about the briefing schedule, and we're adjourned.

4 THE CLERK: All rise.

5 (Proceedings concluded at 10:50 a.m.)

6 * * * * *

7 C E R T I F I C A T I O N

8 I, Maureen Emmons, court approved transcriber,
9 certify that the foregoing is a correct transcript from the
10 official electronic sound recording of the proceedings in the
11 above-entitled matter.

12

13 _____ Date:

14 MAUREEN EMMONS

15 DIANA DOMAN TRANSCRIBING

16

17

18

19

20